

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE  
TTAB

Dec. 2, 98

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

Rubbermaid Incorporated  
v.  
Dean M. Lucente

---

Opposition No. 95,572  
to application Serial No. 74/448,489  
filed on October 15, 1993

---

Richard B. O'Planick for Rubbermaid Incorporated.

Dean M. Lucente, *pro se*.

---

Before Simms, Walters and Bucher, Administrative Trademark  
Judges.

Opinion by Bucher, Administrative Trademark Judge:

An application has been filed by Dean M. Lucente to  
register KEEPERS as a trademark for plastic covers for food  
containers.<sup>1</sup>

---

<sup>1</sup> Serial No. 74/448,489, in International Class 21, filed  
October 15, 1993, based upon an allegation of a *bona fide*  
intention to use the mark in commerce.

Registration has been opposed by Rubbermaid Incorporated on the ground that applicant's mark so resembles the previously used and registered mark GREENS KEEPER for large commercial containers for produce,<sup>2</sup> the unregistered trademark KEEPERS for a wide variety of household containers, and the unregistered trademark KEEPER for food storage containers having plastic covers, as to be likely, when applied to applicant's goods, to cause confusion, or to cause mistake, or to deceive.

Applicant, in answer to the opposition, denied many of the salient allegations.<sup>3</sup>

The record consists of the pleadings, the file of applicant's application and the testimony depositions of two of opposer's witnesses taken by opposer, with exhibits. By notice of reliance under Trademark Rule 2.122(d), opposer has also relied upon its pleaded registration and applicant's discovery responses. Applicant submitted no evidence. Only the opposer has filed a brief in this case.

---

<sup>2</sup> Rubbermaid Commercial Products, Inc., a wholly owned subsidiary of opposer, Rubbermaid Incorporated, is the owner of Registration No. 1,184,813, issued on January 5, 1982 from an application filed on January 26, 1981, which sets forth dates of first use of March 8, 1979; §8 affidavit accepted and §15 affidavit received. The word "GREENS" has been disclaimed apart from the mark as shown.

<sup>3</sup> Applicant denies a likelihood of confusion based on a difference in the goods, etc., but admits to most of opposer's recital of facts and to the fact that applicant has made no use of the mark as of the filing of the pleadings.

The record shows that opposer and its wholly owned subsidiary market plastic containers of all sizes for household and commercial usage, each of which is sold with the appropriate plastic lid. The plastic products sold under the KEEPER mark are primarily food storage containers, the plastic containers sold under the KEEPERS mark can be used for all kinds of household storage purposes, while the GREENS KEEPER mark is used on a more narrow range of large commercial containers directed to the food service industry.

Opposer introduced into the record its pleaded registration for the GREENS KEEPER mark, and has shown use of the GREENS KEEPER mark through the testimony of Patrick W. Brandt, Vice President of opposer's subsidiary. According to Mr. Brandt, Rubbermaid Commercial Products, Inc. has continuously used GREENS KEEPER as its trademark in connection with large commercial containers since at least as early as 1979 (Brandt Deposition at Page 3).

Opposer also demonstrated use of the unregistered trademarks KEEPERS and KEEPER through the testimony of James Joseph Kilcoyne, manager of opposer's Home Products Division. The Kilcoyne testimony shows that opposer has used the KEEPER mark continuously since 1971 (Kilcoyne Deposition at Page 18), and used the trademark KEEPERS continuously since 1986 (Kilcoyne Deposition at Page 30).

The GREENS KEEPER product is promoted at trade shows, through catalogs, and in other media directed to the food service industry (Brandt Deposition at Page 3). Opposer advertises the KEEPERS and KEEPER marks on the smaller household containers in catalogs and specification sheets made available to retailers in all fifty states and overseas, and the marks are prominently applied directly to the products themselves using adhesive labels (Kilcoyne Deposition at Page 28).

Turning first to the issue of priority, the testimony of Mr. Kilcoyne establishes opposer's prior use of the KEEPER and KEEPERS marks. In light of opposer's reliance on the status and title copy of opposer's valid and subsisting registration for GREENS KEEPER, priority of the GREENS KEEPER mark is not an issue. See King Candy Co. v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Even without the pleaded registration, opposer's prior use of the GREENS KEEPER mark is clear from the testimony of Mr. Brandt.

We turn next to the issue of likelihood of confusion. In the course of rendering this decision, we have followed the guidance of In re E.I. DuPont DeNemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973), which sets forth the factors which, if relevant, should be considered in determining likelihood of confusion.

The marks herein are identical or substantially the same. While we must compare the marks in their entireties, we find KEEPER to be the dominant portion of the mark GREENS KEEPER. We give less prominence to the word GREENS in the GREENS KEEPER mark since "greens" is merely descriptive as applied to these goods and hence is disclaimed on that registration. The word "greens" in this context refers to lettuce or other green vegetables that could be washed and stored in this device.

Turning then to a consideration of the respective goods, as previously indicated, we have no testimony or evidence from applicant in the present case. We have only the application file and applicant's answers to opposer's interrogatories. The application lists applicant's goods as "plastic covers for food containers." It seems safe to presume that applicant's goods as identified include goods that could well be identical to one or more of opposer's myriad styles of plastic containers. As opposer argues, almost every item in opposer's extensive line of products sold under all three claimed marks includes a plastic cover for a food storage container.

The application is unrestricted as to potential channels of trade. In response to opposer's interrogatories, applicant confirmed his intentions to sell through the same channels of trade -- through commercial,

wholesale and retail channels -- as those utilized for decades by opposer.

Opposer points out that its lowest-priced storage containers sell for several dollars (Kilcoyne Deposition at Page 37-38). The cost of the product is a valid consideration in analyzing likelihood of confusion because consumers are likely to be less careful when purchasing cheaper items. Purchasers will often treat these as casual or impulse items and hence will not scrutinize closely the product or its source. See Life Industries Corp. v. Star Brite Distributing Inc., 31 F.3d. 42, 31 USPQ2d 1536 (2<sup>nd</sup> Cir. 1994) [The inexpensive nature of boat caulking cartridges (costing around \$6.<sup>00</sup> apiece) favors likelihood of confusion].

There is nothing in the record to suggest any third-party usage or registration of similar marks on similar goods. Mr. Kilcoyne testified that to his knowledge no one else in the industry uses the terms KEEPERS or KEEPER as source indicators (Kilcoyne Deposition at Page 42).

On the spectrum of marks, we must conclude that registrant's marks are at the very least, suggestive.<sup>4</sup> On

---

<sup>4</sup> While this *pro se* applicant said in his answer to the opposition that he considered his own mark KEEPERS to be "descriptive" in relation to his products, this issue was not raised by the Office during *ex parte* examination, nor did applicant challenge opposer's registration or common law claims, and has not raised descriptiveness as an affirmative defense in

the other hand, despite opposer's long and seemingly exclusive use on such a wide variety of goods, we have no evidence, such as consumer recognition surveys, for example, to find any of these three Rubbermaid marks to be well known or famous when applied to plastic household containers, as urged by opposer.

We have reviewed the similar, if not identical, trademarks claimed by these parties. We have seen that the goods would certainly be closely related, if not identical. Hence, we agree with opposer that applicant's use of KEEPERS on his goods so resembles opposer's marks used on opposer's goods as to be likely to cause confusion.

Decision: The opposition is sustained and registration to applicant is refused.

R. L. Simms

C. E. Walters

D. E. Bucher

---

this proceeding. Hence, any descriptiveness issues are not before the Board in this proceeding.

Opposition No. 95,572

Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board